ABDUL BIN PALAGA v. PUBLIC PROSECUTOR

[A.Cr.J. (Lee Hun Hoe J.) December 19, 1972]
[Tawau — Criminal Appeal No. 10 of 1970]

Road Traffic — Whether there is any difference in the degree of negligence between s. 304A of the Penal Code and s. 14(1) of the Road Traffic Ordinance — Driving a motor car so negligently as to endanger human life — Driving without due care and attention — Penal Code, s. 304A — Road Traffic Ordinance (Sabah, Cap. 128), s. 14(1).

This was an appeal from the conviction of the appellant on two charges (1) for driving a motor car in a manner so negligently as to endanger human life contrary to section 304A of the Penal Code; (2) for driving the said motor car without due care and attention contrary to section 14(1) of the Road Traffic Ordinance (Cap. 128). The appellant appealed on the ground, *inter alia*, that the learned magistrate was wrong in holding that there was no difference in the degree of negligence between section 304A of the Penal Code and section 14(1) of the Road Traffic Ordinance.

Held: (1) the degree of negligence required to be proved under section 304A of the Penal Code is not the same as that under section 14(1) of the Road Traffic Ordinance and evidence sufficient to sustain a charge under section 14(1) of the Road Traffic Ordinance need not be sufficient to warrant a conviction under section 304A of the Penal Code where death is proved to be the immediate cause of the negligent act;

(2) in this case the conviction on the charge under section 304A of the Penal Code should be quashed.

Cases referred to:-

(1) *Joseph Chin Saiko* v. *Public Prosecutor* F.C. Criminal Appeal No. 5 of 1971.
(2) *Public Prosecutor* v. *Joseph Chin Saiko* [1972] 2 M.L.J. 129.
(3) *Public Prosecutor* v. *Mills* [1971] 1 M.L.J. 4.
(4) *Cheow Keok* v. *Public Prosecutor* [1940] M.L.J. 200.
(5) *Adnan bin Khamis* v. *Public Prosecutor* [1972] 1 M.L.J. 275.
(6) *Regina* v. *Gosney* [1971] 3 W.L.R. 343, 347.
(7) *Simpson* v. *Peat* [1952] 1 All E.R. 449.
(8) *Voo Yun Fatt* v. *Regina* [1957] S.C.R. 127.

[Editorial Note: The Federal Court did not deliver any written decision in *Joseph Chin Saiko* v. *Public Prosecutor*(1)]

CRIMINAL APPEAL.

Wong Kim Fun for the appellant.

Stephen Foo (Deputy Public Prosecutor) for the respondent.

Lee Hun Hoe J.: This is an appeal against the decisions of the learned stipendiary magistrate sitting at Tawau. I have delayed judgment pending the result of a reference to the Federal Court in the case of *Joseph Chin Saiko* v. *Public Prosecutor*.(1)

Appellant was charged with causing the death of Lee Tze Fen by doing a rash or negligent act in that he drove a motor car along North Road, Tawau, in a manner so negligently as to endanger human life contrary to section 304A of the Penal Code. He was also charged with driving the said motor car without due care and attention contrary to section 14(1) of the Road Traffic Ordinance (Cap. 128). He was convicted on both charges and sentenced to two months' imprisonment on the first charge and a fine of $100 or in default one month's imprisonment on the second charge. In addition his driving licence was endorsed. He appealed against both conviction and sentence.

There are five grounds of appeal. Except for one ground all others are on question of facts. I find that all the grounds on question of facts are without substance. The only ground that need be considered is one concerning the learned magistrate holding that there is no difference in the degree of negligence between section 304A of the Penal Code and section 14(1) of the Road Traffic Ordinance (Cap. 128).

This is an interesting point. Encik Wong Kin Fun for appellant submitted that the degree of negligence in section 304A of the Penal Code was not the same as that in section 14(1) of the Road Traffic Ordinance (Cap. 128), but he conceded that it was the same as in section 15 of the said Ordinance because of the usage of certain words. Encik Stephen Foo, the learned Deputy Public Prosecutor maintained that the learned magistrate was right. The learned magistrate found himself bound by the dictum in *Public Prosecutor* v. *Joseph Chin Saiko*(2) where the charges preferred against accused were section 304A of the Penal Code and section 14(1) of the said Ordinance. In that case the accused was acquitted because the learned magistrate found the principle laid down in *Public Prosecutor* v. *Mills*(3) difficult to understand and chose to disregard it.

In view of the conflicting decisions of the Court of Appeal opportunity was taken in *Public Prosecutor* v. *Joseph Chin Saiko*(2) to refer two questions to the Federal Court under section 66(1) of the Courts of Judicature Act, 1964 for opinion. The first asks which of the two decisions, namely, *Cheow Keok* v. *Public Prosecutor*(4) and *Public Prosecutor* v. *Mills*(3) has given the correct interpretation of section 304A of the Penal Code and should be followed. The second asks whether evidence sufficient to sustain a charge under section 14(1) of the said Ordinance would also be sufficient to warrant a conviction under section 304A of the Penal Code provided death was also proved to be the immediate and not the remote cause of the negligent act.

However, before this reference could be heard a similar reference on the first question from the High Court at Kedah came up for hearing before the Federal Court at Kuala Lumpur. As the matter was of some importance five judges sat in *Adnan bin Khamis* v. *Public Prosecutor*(5) to consider the reference. H. T. Ong, C.J., Malaya, who delivered the judgment of the court, after reviewing numerous authorities, stated:

"For the reasons above stated we are unanimously of the opinion that the judgment delivered in *Cheow Keok* must be regarded as *per incuriam*. Accordingly, the answer to the first question must be in the negative."

To assist the court to construe "negligence" arising out of a variety of circumstances under different sections of the Penal Code the Chief Justice declared that: "To serve any practical purpose the answer should be clear and precise. In the first place, mere carelessness or inadvertence, without anything more, is not enough, in our opinion, to establish guilt. An essential ingredient of all offences under the Penal Code is *mens rea;* although, in the context of culpable rashness or negligence, *mens rea* should not be understood as synonymous with 'criminal intention' or 'wicked mind'. Rather, it should be construed as connoting fault or blameworthiness of conduct. In the second place, the fault or blameworthiness must, as in all criminal cases, be proved by the prosecution beyond reasonable doubt not, as in civil cases, on balance of probabilities. Once these principles have been grasped, we think the test to be applied for determining the guilt or innocence of an accused person charged with rash or negligent conduct is to consider whether

or not a reasonable man in the same circumstances would have been aware of the likelihood of damage or injury to others resulting from such conduct and taken adequate and proper precautions to avoid causing such damage or injury. This test is partly objective and partly subjective — objective in the sense that the situation must be one fraught with potential risk of injury to others or whatever consequences contemplated in any particular section of the Penal Code. It is also subjective in that such a situation should have arisen by reason of some fault on the part of the accused. See *Regina* v. *Gosney*[6] *per* Megaw LJ at page 347".

Consequently, when the reference came up for hearing in *Joseph Chin Saiko* v. *Public Prosecutor*[1] the first question was abandoned. As to the second question the Federal Court stated that the answer to the second question should be in the negative. In *Public Prosecutor* v. *Joseph Chin Saiko*[2] I expressed the view that the test of "a reasonable and prudent driver would exercise in the circumstances" as laid down in *Simpson* v. *Peat*[7] and adopted by *Voo Yun Fatt* v. *Regina*[8] could be applied to section 304A bearing in mind the additional element required to be established. This view must now be regarded as wrong in the light of the answer given by the Federal Court to the second question.

As the learned magistrate convicted the appellant on both charges and as the dictum in *Public Prosecutor* v. *Joseph Chin Saiko*[2] undoubtedly influenced his decision to convict appellant of the charge under section 304A of the Penal Code I would allow the appeal on this charge. However, on the evidence he was entitled to convict the appellant on the charge under section 14(1) of the Road Traffic Ordinance (Cap. 128). I would therefore not interfere with this conviction and the endorsement.

The result is that the conviction on the first charge is quashed and sentence set aside. The conviction on the second charge is confirmed.

His Lordship the Chief Justice pointed out that in West Malaysia in the case of fatal accidents, section 304A of the Penal Code seemed to have been rendered practically redundant by section 34A of the Road Traffic Ordinance, 1958. I may add that in Sarawak there is section 26 of the Road Traffic Ordinance (Cap. 131). However, in Sabah there is no provision in the traffic legislation similar to that of West Malaysia or Sarawak. Perhaps it is time that the legislature consider the inclusion of a similar provision in the Sabah traffic legislation.

Order accordingly.

CHUA GUAN KENG v. PUBLIC PROSECUTOR

[A.Cr.J. (B.T.H. Lee J.) January 12, 1973]
[Kuching — Criminal Appeal No. K 17 of 1972]

Criminal Law and Procedure — Summary procedure — Duty of court at end of prosecution case — Difference in procedure in Peninsular Malaysia and in Sarawak — Sarawak Criminal Procedure Code, (Cap. 54), s. 163.

This was an appeal against the conviction of the appellant on charges of fradulent evasion of customs duty and failure to give correct information in respect of goods declared under the Customs Act, 1967 and the Sales Tax Act, 1972, respectively. The learned magistrate in this case in calling on the appellant for his defence at the trial had relied on the case of *Wong Ah Mee* v. *Public Prosecutor*[1] decided on section 173(f) of the F.M.S. Criminal Procedure Code.

Held: (1) the relevant provision in Sarawak is section 163 of the Sarawak Criminal Procedure Code which differs from section 173(f) of the F.M.S. Criminal Procedure Code, as it empowers the magistrate to call on the accused for his defence if there is evidence which if believed would warrant his conviction;

(2) in this case there was ample evidence if accepted by the magistrate to warrant the conviction of the appellant and therefore the appeal must be dismissed.

Cases referred to:-

(1) *Wong Ah Mee* v. *Public Prosecutor* [1970] 1 M.L.J. 98.
(2) *Public Prosecutor* v. *Omar Lopez* [1967] 2 M.L.J. 281.
(3) *Mahadi* v. *Public Prosecutor* [1970] 1 M.L.J. 17.
(4) *Evans* v. *Bartlam* [1937] 2 All E.R. 649.
(5) *Mahasen* v. *Public Prosecutor* [1970] 1 M.L.J. 256.
(6) *Lim Tong* v. *Public Prosecutor* [1938] M.L.J. 41.

CRIMINAL APPEAL.

Joseph Tang for the appellant,

Steve Shim (Deputy Public Prosecutor) for the respondent.

B.T.H. Lee J.: In this case the appellant was charged in the District Court, Kuching, as follows:—

1st Charge

"That you on 4th day of April, 1972, at Kuching Port, Kuching were knowingly concerned in an attempt at fraudulent evasion of Customs duty, to wit, $888.56 being the difference between the duty on $3,847.58 and $920.00 leviable by law on goods imported into the State of Sarawak from Singapore and you have thereby committed an offence under section 135(1)(g) and punishable under section 135(1)(i) of the Customs Act, 1967."

2nd Charge

"That you on 4th day of April, 1972, at Kuching Port, Kuching failed to give correct information in respect of goods declared vide Import Declaration No. 110752 for which the correct value should be $3,847.58 instead of $920.00 and thereby committed an offence under section 43(d) of the Sales Tax Act, 1972, and punishable under the same section of the said Act."

The appellant was convicted on both charges and fined $5,000 on the 1st charge and $1,000 on the second charge.

Against that conviction appellant appealed on a number of grounds. It is to be observed that the prosecution in the lower court was conducted by a customs officer.

The first matter to which I desire to call attention is that considerable confusion has arisen from failure on the part of magistrates to keep in view the statutory provisions of the Sarawak legislation and in particular the Sarawak Criminal Procedure Code in this case.

Magistrates should take warning that when Malayan authorities on the construction of Malayan Ordinances are quoted they should be carefully scrutinised to ascertain whether the portion of the Malayan Ordinance in question is the same as the corresponding portion of the corresponding Sarawak Ordinance.

If the two portions are the same, then, in the absence of any local decision to the contrary, any decision of the Malayan courts can safely be followed.

If the portions are different, then any decision of the Malayan courts should be studied with very great care lest it should turn not on a point on which the Ordinances correspond but on a point on which they differ.